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No. 80-1471

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Commonwealth of Massachusetts;
New England Power Company;
Dennis J. Roberts II, Attorney General of
Rhode Island; and Edward F. Burke,
Administrator of Rhode Island Division
of Public Utilities and Carriers,
Appellants,

v.

New Hampshire Legislative Utility
Consumers' Council,
Appellee.

On Appeal from the Supreme Court of
New Hampshire

MOTION OF THE LEGISLATIVE UTILITY CONSUMERS' COUNCIL TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee New Hampshire Legislative Utility Consumers' Council respectfully moves to dismiss the fourth and fifth questions presented in the above captioned appeal on the ground that the questions are so unsubstantial as not to warrant further argument.

SUMMARY OF ARGUMENT

The privileges and immunities clause (art. IV §2) of the United States Constitution does not apply, either directly or indirectly, to the factual situation presented to this Court. New Hampshire's application of N.H. Rev. Stat.

Annot. 374:35 does not have the impact of treating Massachusetts' citizens in the State of New Hampshire differently than N.H. citizens in the State of New Hampshire.

The Commonwealth's argument that §201 (b) of the Federal Power Act is an unconstitutional exercise of the commerce power must fail because appellant fails to state with specificity the constitutional provision with which §201 (b) purportedly conflicts. If the point of appellants argument is that §201 (b) conflicts with the commerce clause, that argument also fails because there is no authority for that proposition and significant authority to the contrary.

Additionally, the tenth amendment is not a bar to the enactment of §201 (b) because §201 (b) does not limit the authority of or infringe upon the State of Massachusetts as a state nor does it infringe upon the citizens of Massachusetts. Section 201 (b) reserves to the State of New Hampshire the right to continue the regulation of the exportation of hydroelectricity as it had done between 1913 and the passage of the Federal Power Act.

Finally, the privileges and immunities clause (art.IV §2) is not a bar to §201 (b) because that clause does not limit federal authority but requires that states treat individuals within their geographic boundaries on a consistent basis, regardless of their place of residence.

ARGUMENT

I. N.H. REV. STAT. ANNOT. 374:35 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE (art.IV, §2) OF THE UNITED STATES CONSTITUTION.

This Court's consistent interpretation of the privileges and immunities clause is the one announced in Toomer v. Witseil, 334 U.S. 385,395 (1948), "The primary purpose of this clause...was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." The line of cases in which the clause is used to uphold the rights of a foreign citizen to exercise all the rights of state citizens while in that state are legion and trace

their origin to Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (Case No. 3230) (C.C.E.D.Pa.1823). See: Paul v. Virginia, 8 Wall 168, 180 (1869), Hague v. CIO, 307 U.S. 496, 511 (1939), Austin v. New Hampshire, 420 U.S. 656, 660-661 (1975), and Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978).

Appellant Commonwealth of Massachusetts cites no authority to suggest that the privileges and immunities clause applies to foreign citizens who are not physically located in the host state. It is antithical to the concept of state government to suggest that New Hampshire can pass laws which either grants privileges or proscribes actions outside its state.

New Hampshire's law neither grants a right nor denies a privilege to Massachusetts citizens consuming in Massachusetts. It does not even pretend to regulate action of New Hampshire citizens consuming in Massachusetts. New Hampshire could no more regulate Massachusetts consumers consuming in Massachusetts than it can regulate Massachusetts drivers driving in Massachusetts.

What New Hampshire does is proscribe

companies producing hydroelectricity in the State of New Hampshire from shipping the electricity out-of-state without Public Utilities Commission permission. The prohibition falls equivalently on New Hampshire companies and foreign companies. There is no discrimination.

II. SECTION 201 (b) OF THE FEDERAL POWER ACT IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE COMMERCE POWER NOR DO THE TENTH AMENDMENT OR THE PRIVILEGES AND IMMUNITIES CLAUSE INVALIDATE §201 (b).

The Commonwealth of Massachusets, in its fifth question (jurisdictional statement 22), really raises three separate questions. They are:

a. Has Congress somehow violated the Constitution by enacting §201 (b) of the Federal Power Act;

b. Has Congress violated the tenth amendment rights of the Commonwealth of Massachusetts and its citizens by its enactment of §201 (b) of the Federal Power Act; and,

c. Has Congress violated the priviliges and immunities clause (art.

IV, §2) by enacting §201 (b) of the Federal Power Act.

We will treat each of these questions separately.

A. Has Congress somehow violated the Constitution by enacting §201 (b) of the Federal Power Act?

The Commonwealth of Massachusetts argues that Congress' enactment of §201 of the Federal Power Act, 16 U.S. C. §824(b), "is an unconstitutional exercise of the commerce power...." What part of the Constitution is violated, the Commonwealth does not say. The Commonwealth does not argue that the commerce clause itself was violated but rather that the favoring of one state over another is somehow unconstitutional. Absolutely no citation is made for this theory. The Commonwealth may have intended to argue that §201 (b) is inconsistent with the commerce clause but that argument must also fail.

While it does attempt to distinguish Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946), Secretary of Agriculture v. Central Roig Refining Company, 338 U.S. 604, 616 (1950) and South Caro-

lina v. Katzenbach, 383 U.S. 301, 328-29 (1966), it is completely unsuccessful in this attempt. If the Commonwealth is arguing that §201 conflicts with the commerce clause then the question presented must be answered by looking to Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). Any discrimination associated with §201 (b) only reflects geographical differences and the fact that some states had regulated the exportation of hydroelectricity prior to the enactment of the Federal Power Act. The discrimination is not the product of Congress but of differences in individual legislative initiatives.

Essentially, what the Commonwealth of Massachusetts characterizes as "seriously prejudicial and uneven treatment by Congress" is the simple recognition and ratification in a grandfather clause of prior existing state legislation and regulation and not some unique attempt to deprive the citizens of Massachusetts of their essential rights.

B. Has Congress violated the tenth amendment rights of the Commonwealth of Massachusetts and its citizens by its

enactment of §201 (b) of the Federal Power Act?

The Commonwealth next argues that the tenth amendment prevents Congress from enacting §201 (b) of the Federal Power Act under its plenary authority of the commerce clause. Section 201 (b), very simply, grants to certain states the privilege of continuing to regulate hydroelectricity as they had done before the Federal Power Acts' enaction. It does not in any way infringe upon the rights of citizens of those states having statutes similar to N.H. Rev. Stat. Annot. 394:35 or any other states. Section 201 (b) does not diminish any rights, powers, or previous activities of any state in the union. What §201 (b) does is to extend the privilege of continuing to exercise rights, privileges, and actions which were exercised prior to its passage. The tenth amendment protects states from infringement by the federal government in areas of integral government functions, National League of Cities v. Usery, 426 U.S. 833, 855 (1976). Since there is no infringement by §201 (b) upon any states integral governmental functions, there can be no viola-

tion of the tenth amendment.

C. Has Congress violated the privileges and immunities clause (art.IV, §2) by enacting §201 (b) of the Federal Power Act?

The Commonwealth's last breath is to once again raise the specter of the privileges and immunities clause (art.IV, §2) of the Constitution. The central question raised is whether the privileges and immunities clause applies to the federal government or not. The answer is that it does not.

The Commonwealth fails to cite any authority for the proposition that art.IV, §2 applies to the federal government. It cannot cite any authority because there is none. The privileges and immunities clause of article IV, §2 of the United States Constitution is not an appropriate source with which to challenge a federal statute regulating an area exclusively within the power of Congress. The privileges and immunities clause of article IV, §2 is a limitation on the powers of the states, not Congress, and can in no way limit the power

of Congress over matters within its exclusive authority. The language of the privileges and immunities clause can leave no doubt that it applies to the states and not the federal government. The clause reads:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

There is no hint from the plain meaning of the clause in question that it was meant to apply as a limitation on Congress' authority and no such interpretation should be reached. Additionally, in Lung v. O'Chesky, 414 U.S. 802 (1973), this Court affirmed a decision from the District Court for the District of New Mexico that disfavors the interpretation of the privileges and immunities clause suggested by the Commonwealth. In a percuriam opinion that court said with respect to the privileges and immunities clause, "That clause is a limitation on the powers of the states and in no way affects the powers of Congress over matters in the District of Columbia. Duehay v. Acacia Mutual Life Ins. Co., 70 App. D.C. 245, 105 F2d 768 (1939)." 358

F. Supp. 928, 931 (1973). See also Haavick v. Alaska Packers Association, 263 U.S. 510, 515 (1924).

None of the three subquestions presented under the fifth question raise substantial federal questions. Therefore the Court should not note probable jurisdiction on these questions.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed with respect to the fourth and fifth questions presented or the judgment of the Supreme Court of New Hampshire should be affirmed on those questions.

Respectfully submitted,
THE NEW HAMPSHIRE LEGISLATIVE
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